

## Securities and Exchange Commission

## § 240.3a4-2

issuer otherwise than in connection with transactions in securities; and

(B) The associated person was not a broker or dealer, or an associated person of a broker or dealer, within the preceding 12 months; and

(C) The associated person does not participate in selling an offering of securities for any issuer more than once every 12 months other than in reliance on paragraph (a)(4)(i) or (iii) of this section, except that for securities issued pursuant to rule 415 under the Securities Act of 1933, the 12 months shall begin with the last sale of any security included within one rule 415 registration.

(iii) The associated person restricts his participation to any one or more of the following activities:

(A) Preparing any written communication or delivering such communication through the mails or other means that does not involve oral solicitation by the associated person of a potential purchaser; *Provided, however*, that the content of such communication is approved by a partner, officer or director of the issuer;

(B) Responding to inquiries of a potential purchaser in a communication initiated by the potential purchaser; *Provided, however*, That the content of such responses are limited to information contained in a registration statement filed under the Securities Act of 1933 or other offering document; or

(C) Performing ministerial and clerical work involved in effecting any transaction.

(b) No presumption shall arise that an associated person of an issuer has violated section 15(a) of the Act solely by reason of his participation in the sale of securities of the issuer if he does not meet the conditions specified in paragraph (a) of this section.

(c) *Definitions.* When used in this section:

(1) The term *associated person of an issuer* means any natural person who is a partner, officer, director, or employee of:

(i) The issuer;

(ii) A corporate general partner of a limited partnership that is the issuer;

(iii) A company or partnership that controls, is controlled by, or is under common control with, the issuer; or

(iv) An investment adviser registered under the Investment Advisers Act of 1940 to an investment company registered under the Investment Company Act of 1940 which is the issuer.

(2) The term *associated person of a broker or dealer* means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial and any person who is required under the laws of any State to register as a broker or dealer in that State solely because such person is an issuer of securities or associated person of an issuer of securities shall not be included in the meaning of such term for purposes of this section.

[50 FR 27946, July 9, 1985]

### **§ 240.3a4-2 Exemption from the definition of “broker” for bank calculating compensation for effecting transactions in fiduciary accounts.**

(a) A bank that meets the conditions for exception from the definition of the term “broker” under Section 3(a)(4)(B)(ii) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)), except for the “chiefly compensated” condition in Section 3(a)(4)(B)(ii)(I) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(I)), is exempt from the definition of the term “broker” under Section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) solely for effecting transactions in securities pursuant to Section 3(a)(4)(B)(ii) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)) if:

(1) The bank can demonstrate that sales compensation, as defined in § 240.3b-17(j), received during the immediately preceding year is less than 10% of the total amount of relationship compensation, as defined in § 240.3b-17(i), received during that year;

(2) The bank maintains procedures reasonably designed to ensure compliance with the “chiefly compensated” condition in Section 3(a)(4)(B)(ii)(I) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(I))

### § 240.3a4-3

### 17 CFR Ch. II (4-1-02 Edition)

with respect to a trust or fiduciary account:

- (i) When the account is opened;
- (ii) When the compensation arrangement for the account is changed; and
- (iii) When sales compensation, as defined in §240.3b-17, received from the account is reviewed by the bank for purposes of determining an employee's compensation; and

(3) The bank complies with Section 3(a)(4)(C) of the Act (15 U.S.C. 78c(a)(4)(C)).

(b) For purposes of this section, the term *year* means either a calendar year or other fiscal year consistently used by the bank for recordkeeping and reporting purposes.

[66 FR 27796, May 18, 2001]

#### **§ 240.3a4-3 Exemption from the definition of “broker” for bank effecting transactions as an indenture trustee in a no-load money market fund.**

A bank that meets the conditions for exception from the definition of the term “broker” under Section 3(a)(4)(B)(ii) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)), except for the “chiefly compensated” condition in Section 3(a)(4)(B)(ii)(I) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(I)), is exempt from the definition of the term “broker” under Section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) solely for effecting transactions as an indenture trustee in a no-load money market fund, as defined in §240.3b-17(f) and §240.3b-17(e), respectively.

[66 FR 27796, May 18, 2001]

#### **§ 240.3a4-4 Exemption from the definition of “broker” for small bank effecting transactions in investment company securities in a tax-deferred custody account.**

(a) A small bank is exempt from the definition of the term “broker” under Section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) solely for effecting transactions in securities of an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) in a tax-deferred account for which the bank acts as custodian under Section 3(a)(4)(B)(viii) of the Act (15 U.S.C. 78c(a)(4)(B)(viii)) if:

(1) The bank is not associated with a broker or dealer and does not have an arrangement with a broker or dealer to effect transactions in securities for the bank's customers;

(2) Any bank employee effecting such transactions:

(i) Is not an associated person of a broker or dealer;

(ii) Primarily performs duties for the bank other than effecting transactions in securities for customers; and

(iii) Does not receive compensation for such transactions from the bank, the executing broker or dealer, or any other person related to:

(A) The size, value, or completion of any securities transaction;

(B) The amount of securities-related assets gathered; or

(C) The size or value of any customer's securities account;

(3) The bank complies with Section 3(a)(4)(C) of the Act (15 U.S.C. 78c(a)(4)(C));

(4) The bank makes available to the tax-deferred account the securities of investment companies that are not affiliated persons, as defined in Section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3)), of the bank and that have similar characteristics to the securities of investment companies made available that are affiliated persons;

(5) The bank does not solicit securities transactions except through the following activities:

(i) Delivering advertising and sales literature for the security that is prepared by the registered broker-dealer that is the principal underwriter of an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), or prepared by an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) that is not an affiliated person, as defined in Section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3)), of the bank;

(ii) Responding to inquiries of a potential purchaser in a communication initiated by the potential purchaser; provided, however, that the content of